

1997

Ann Elizabeth Thomas v. Bert Charles Thomas : Brief of Appellant

Utah Court of Appeals

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APPEALS

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IN THE UTAH STATE COURT OF APPEALS

970472-CA

ANN ELIZABETH THOMAS.

BRIEF OF APPELLANT

Appellant.

vs.

Appeal No. 970472-CA

BERT CHARLES THOMAS,

Priority No. 15

Appellee.

BRIEF OF APPELLANT

APPEAL FROM AN ORDER IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
THE HONORABLE LYNN S. DAVIS PRESIDING

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ORAL ARGUMENT REQUESTED

FILED

Utah Court of Appeals

JUL 17 1998

Julia D'Alesandro
Clerk of the Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv, v
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS.	
STATUTES ORDINANCES AND RULES	3
STATEMENT OF THE CASE	5
A. NATURE OF THE CASE	5
B. COURSE OF THE PROCEEDINGS.	7
C. DISPOSITION OF TRIAL	8
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	19
DETAIL OF ARGUMENT	
I. <u>WHERE THE COURT RULED THAT "IT IS CLEARLY IN THE BEST INTEREST OF THE CHILDREN TO BE AWARDED TO ANN THOMAS" IT IS CLEARLY ERRONEOUS TO IGNORE THAT FINDING AND AWARD THE CHILDREN TO THE RESPONDENT BASED SOLELY ON FINDINGS OR MORAL FITNESS AND THE CHARACTER OF A NON-COHABITING THIRD PARTY</u>	21
II. <u>ALIMONY SHOULD CONTINUE FOR A PERIOD NOT TO EXCEED THE DURATION OF THE MARRIAGE WHERE NO FACTS APPEAR WHICH WOULD JUSTIFY TERMINATION AFTER THREE YEARS</u>	28
III. <u>THE MARITAL HOME IS A COMMINGLED ASSET AND SHOULD HAVE BEEN EQUITABLY DISTRIBUTED TO THE PARTIES. FURTHERMORE, THERE IS NOT RELIABLE FACTUAL BASIS FOR THE COURT'S FINDING OF A PREMARITAL FAIR MARKET VALUE</u>	29
IV. <u>THE COURT SHOULD HAVE VALUED AND DISTRIBUTED BERT THOMAS CONSTRUCTION COMPANY INCLUDING THE HISTORICAL BALANCE IN THE LIQUID ACCOUNTS WHICH WERE DISSIPATED BY THE RESPONDENT</u>	33
CONCLUSION	35

ADDENDUM

- A. Findings of Fact and Conclusions of Law
- B. Ruling of Judge Lynn W. Davis, dated August 19, 1996
- C. Custody Evaluation of Jay P. Jensen
- D. Custody Evaluation of Elizabeth B. Stewart, Ph.D.
- E. Derk Rasmussen Exhibits regarding Bert Thomas Construction Company assets
- F. Bert Thomas Construction Company "Tool List 1/1/95"
- G. Utah Bar Journal, Volume XI, No. 3, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce*, April, 1998, pages 16 - 24, David S. Dolowitz.

TABLE OF AUTHORITIES

Cases

<u>Berger v. Berger</u> , 713 P.2d 695, 697 (Utah 1985)	4, 29
<u>Erwin v. Erwin</u> , 773 P.2d 847, 849 (Utah App. 1989)	4, 22
<u>Fletcher v. Fletcher</u> , 615 P.2d 1218, 1222-1223 (Utah 1980)	4, 29
<u>Fontenot v. Fontenot</u> , 714 P.2d 1131, 1132-33 (Utah 1986)	4, 22
<u>Jeffries v. Jeffries</u> , 895 P.2d 835 at 838 (Utah App. 1995)	4, 34
<u>Kallas v. Kallas</u> , 614 P.2d 641, 645 (Utah 1980)	4, 22
<u>Lynn v. Lynn</u> , 165 N.J. Super. 328 (N.J. App. Div. 1979)	4, 35
<u>Maughn v. Maughn</u> , 770 P.2d 156, 159 (Utah App. 1989)	1, 2, 3, 4
<u>Merriam v. Merriam</u> , 799 P.2d 1172 (Utah App. 1990)	4, 22
<u>Mortensen v. Mortensen</u> , 760 P.2d 304 (Utah 1988)	4, 30, 31, 32
<u>Nielsen v. Nielsen</u> , 620 P.2d 511, 514 (Utah 1980)	4, 22
<u>Peck v. Peck</u> , 738 P.2d 1050, 1052 (Utah App. 1987)	4, 29
<u>Riche v. Riche</u> , 784 P.2d 465, 467 (Utah App. 1989)	2, 3, 4
<u>Roberts v. Roberts</u> , 835 P.2d 193 (Cal. 1992)	4, 23
<u>Sanderson v. Tryon</u> , 739 P.2d 623 (Utah 1987)	4, 23
<u>Shepherd v. Shepherd</u> , 816 P.2d 249 (Utah App. 1994)	5, 34
<u>Shioji v. Shioji</u> , 671 P.2d 135, 138 (Utah 1983)	5, 22
<u>Stuber v. Stuber</u> , 121 Utah 632, 637, 244 P.2d 650, 652 (1952)	5, 22
<u>Thronson v. Thronson</u> , 810 P.2d 428 (Utah App. 1991)	5, 29
<u>Tucker v. Tucker</u> , 881 P.2d 948 (Utah App. 1984)	2, 3, 5, 22, 23
<u>Tucker v. Tucker</u> , II. 910 P.2d 1209 (Utah 1996)	5, 22
<u>Weiss v. Weiss</u> , 226 N.J. Super. (N.J. App. Div. 1988)	5, 35

Statutes

§78-2a-3(2)(h), <u>Utah Code Ann.</u> (1953 as amended)	1, 4
§30-3-10(1) <u>Utah Code Ann.</u> , (1953 as amended)	3, 22
Rule 4-903 of the <u>Code of Judicial Administration</u>	3, 26
Rule 705 of the <u>Utah Rules of Evidence</u>	3, 33

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BRIEF OF APPELLANT

Appellant.

vs.

Appeal No. 970472-CA

BERT CHARLES THOMAS,

Appellee.

STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal properly lies with the Utah Court of Appeals pursuant to §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

a. Issue I: Did the court err in awarding the Respondent custody of the parties' children where the court concluded that "it is clearly in the best interests of the children to be awarded to Ann Thomas", but for the findings regarding moral fitness and the character of a non-cohabitant third party?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous"

standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984).

b. Issue II: Did the Court err in limiting the Petitioner's alimony award to thirty-six (36) months without any supporting findings?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

c. Issue III: Did the court err in failing to find that the family home was a marital asset in its entirety?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision

must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

d. Issue IV: Should the court have included in the martial estate Bert Thomas Construction Company, including cash on hand which was depleted during the pendency of the case in part to pay court ordered support obligations?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS. STATUTES.
ORDINANCES AND RULES.**

A. Statutes:

- i. §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).
- ii. Utah Code Ann, §30-3-10(1) (1953 as amended).
- iii. Rule 4-903 of the Code of Judicial

Administration

- iv. Rule 705 of the Utah Rules of Evidence

B. Case Law:

- i. Berger v. Berger, 713 P.2d 695, 697 (Utah 1985);
- ii. Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989).
- iii. Fletcher v. Fletcher, 615 P.2d 1218, 1222-1223 (Utah 1980).
- iv. Fontenot v. Fontenot, 714 P.2d 1131, 1132-33 (Utah 1986);
- v. Jeffries v. Jeffries, 895 P.2d 835 at 838 (Utah App. 1995).
- vi. Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980);
- vii. Lynn v. Lynn, 165 N.J. Super. 328 (N.J. App. Div. 1979).
- viii. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989).
- ix. Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990).
- x. Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988).
- xi. Nielsen v. Nielsen, 620 P.2d 511, 514 (Utah 1980)
- xii. Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987);
- xiii. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989).
- xiv. Roberts v. Roberts, 835 P.2d 193 (Cal. 1992).
- xv. Sanderson v. Tryon, 739 P.2d 623 (Utah 1987).

- xvi. Shepherd v. Shepherd, 816 P.2d 249 (Utah App. 1994).
- xvii. Shioji v. Shioji, 671 P.d 135, 138 (Utah 1983);
- xviii. Stuber v. Stuber, 121 Utah 632, 637, 244, P.2d 650, 652 (1952).
- xix. Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991).
- xx, Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984).
- xxi. Tucker v. Tucker, II. 910 P.2d 1209 (Utah 1996).
- xxii. Weiss v. Weiss, 226 N.J. Super. (N.J. App. Div. 1988).

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This divorce case was tried before Judge Lynn W. Davis between December 5 - 8, 1995 and February 26, 1995. Judge Davis' decision was rendered by Memorandum on August 19, 1996. The parties were married eight days short of their 15th anniversary. During the pendency of the action, Ann Thomas enjoyed custody of the two children subject to a liberal and nearly equal time sharing visitation agreement. Custody evaluations were performed by Dr. Elizabeth B. Stewart and Dr. Jay P. Jensen. At trial Dr. Jensen testified *that his recommendation was for the parties to divide the physical time with the children equally.* Dr. Stewart recommended that the Ann Thomas be awarded sole custody. The court found:

"The reason this case is so troubling is because of Pedro Sauer and his negative

influence on the family. Absent his entry, and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas."

Findings of Fact, ¶79.

Ann Thomas and Pedro Sauer developed a romantic relationship either just prior to separation or after separation. The court found that Mr. Sauer was a "convicted criminal", "suave" and "debonair." In determining that Mr. Thomas should be awarded custody of the children, the court considered the best interests of the children as "an important factor, but will also consider the past conduct and moral standards of the parties" Findings of Fact, ¶57.

Mr. Thomas owned a home 35% completed and under construction at the time of the marriage. The court concluded that the value of the home was \$150,000.00 at the time of the marriage based upon the opinion of appraiser Jud Harwood. Mr. Harwood's opinion as to the value at marriage was based upon a data base, notes and an interview which were not available in his report or at trial.

Mr. Thomas owns Bert Thomas Construction Company. He is the sole owner of the company. It maintained a savings account throughout the marriage which averaged a balance of approximately \$37,000.00. As money was required for the family from time to time funds would be disbursed to Mr. Thomas as income. That account was substantially depleted during the pendency of the case coincident with Mr. Thomas' self reported reduction in

income. The money was used, among other things, for the payment of court ordered support payments.

Ann Thomas was awarded \$700.00 per month alimony for a period of thirty-six (36) months to begin with the commencement of the temporary order. The effect of this order was to terminate alimony prior to the entry of the Decree.

This appeal addresses the following issues:

1. The legal standard applied by the court in determining custody and the weight to be given moral conduct.
2. Whether the court articulated or had any basis to limit the duration of alimony.
3. Whether the court should have considered the family home as a marital asset and commingled any premarital portion thereof.
4. Whether the court should have considered the Bert Thomas Construction Company and its savings account as a dissipated marital asset.

B. COURSE OF THE PROCEEDINGS.

Following the conclusion of trial in February, 1996 oral argument was heard on April 1, 1996. The court rendered its decision on August 19, 1996. The ruling did not deal with all of the issues presented at trial. The ruling did not specify Mrs. Thomas' visitation rights or the amount and duration of alimony. These matters were heard subsequently by motion and two additional rulings were made which have been incorporated in the final Findings of Fact and Conclusions of Law, and Decree of

Divorce which were entered on July 9, 1997. Ann Thomas filed her Notice of Appeal on August 5, 1997.

C. DISPOSITION OF TRIAL.

The trial court entered its Findings of Fact and Conclusions of Law, and Decree of Divorce on July 9, 1997.

STATEMENT OF FACTS

1. The parties were married July 17, 1983.

2. The parties have had two children born of the marriage as follows: Joseph, born July 12, 1986 and Katy, born July 8, 1989.

3. The parties separated on March 21, 1983.

4. Mrs. Thomas is a schoolteacher, aged forty (40) years old, with a B.S. degree from the University of Utah. She teaches in the Alpine School District in the same school the children attend. (Findings of Fact, ¶¶5 - 7.)

5. Mr. Thomas is a self-employed building contractor, a high school graduate, who lives in the Sundance, Utah County area, and concentrates his business in that community. (Findings of Fact, ¶8 and 9.)

6. The trial court considered the "best interests of the child" as an important factor but also considered the past conduct and moral standards of the parties and which parent will act in the best interests, and the other relevant factors such as keeping the siblings together and each child's bond with the parent. (Findings of Fact, ¶57.)

7. The court adopted Dr. Stewart's finding of a strong sibling bond and found that it was in the best interests of the children not to be separated. (Findings of Fact, ¶58.)

8. Ann Thomas was the primary caretaker for the children prior to the parties' separation and has performed well as the mother of the children before separation and since. (Findings of Fact, ¶62-63.)

9. Mr. Thomas acknowledged that Ann Thomas is a competent, caring mother who has indeed been the primary care giver for the children throughout their lives. (Findings of Fact, ¶64.)

10. As the primary care giver, Mrs. Thomas has seen to the day to day needs of the children, typically been the parent who has been home when they return home, assisted the children with their school work, made sure the children received the appropriate medical and dental care, typically transported the children when such was necessary, entertained the children, disciplined the children and so forth. Mr. Thomas was also involved in these activities. (Findings of Fact, ¶65.)

11. The children interact with Mrs. Thomas as their primary care provider and have established confidence in her as the primary care provider. (Findings of Fact, ¶66.)

12. The court interviewed Joseph and Katie in the course of the proceedings. (Finding of Fact, ¶52.)

13. The children's social needs have principally been met through their school association. (Findings of Fact, ¶69.)

14. It is unclear when Ann Thomas and Mr. Pedro Sauer entered into a sexually intimate relationship, whether prior to separation or since that time. (Findings of Fact, ¶73(e).)

15. The relationship between Mrs. Thomas and Mr. Sauer has continued for several years and it is their intention to marry when they are legally able. Mr. Sauer was still married at the time of trial. (Findings of Fact, ¶74.)

16. Custody evaluations were performed by Dr. Jay P. Jensen and Dr. Elizabeth B. Stewart. Both experts provided written evaluations.

17. Dr. Jensen favored a joint physical custody award with the children residing with one parent for one week and the other parent the next with no intervening visitation for either party. (Trial Transcript, Volume III, page 113, Lines 4 - 25.)

18. Dr. Stewart recommended that Ann Thomas be awarded sole custody. (Trial Transcript, Volume I, page 106, lines 2 - 13.)

19. Dr. Jensen relied upon information related to him from Mr. Thomas who, reportedly, gathered information from Pedro Sauer's wife and Mrs. Thomas. (Trial Transcript, Volume I, page 45, lines 13 - 25, and page 46, lines 1 - 13.)

20. Dr. Jensen did not contact collateral sources provided by the parties because Mrs. Thomas had provided more collateral sources than Mr. Thomas and he wanted to keep the evaluation as "bilateral as possible." (Trial Transcript, Volume I, page 47, lines 17 - 25, and page 48, lines 1 - 13.)

21. Dr. Jensen reported "through the evaluation process it became clear that information regarding Ann's boyfriend was a central concern to the best interests of the children." (Trial Transcript, Volume I, page 48, lines 9- 12)

22. Dr. Jensen found "there are no apparent deficits of natural ability of either parent to provide for the children's physical, emotional and spiritual needs." (Trial Transcript, Volume I, page 53, lines 10 - 15).

23. Mr. Thomas' report regarding Pedro Sauer affected Dr. Jensen's perception of Mrs. Thomas and her ability to provide for the children. (Trial Transcript, Volume I, page 62, lines 8 - 19).

24. Dr. Jensen was not able to observe any negative impact presently on the children by virtue of Mr. Sauer. (Trial Transcript, Volume I, page 63, lines 2 - 17.)

25. Dr. Jensen testified that he did not believe Pedro Sauer played a central role in the formation of his opinion about the children's best interests. Rather, Mr. Sauer represented a potential and present "source of instability" to the children. (Trial Transcript, Volume I, Page 77, lines 18 - 25, page 78, lines 1 -19.)

26. Dr. Jensen determined that it was not necessary to speak to Mr. Sauer and did not, in fact, speak with Mr. Sauer. (Trial Transcript, Volume I, page 80, lines 15 - 25 and page 8, lines 1 - 7.)

27. Dr. Stewart interviewed the parties and Pedro Sauer. (Trial Transcript, page 92, lines 15 - 25, and page 93, lines 1-6.)

28. Dr. Stewart considered two principal questions: (1) whether or not Mrs. Thomas had an appreciation for the children's relationship with Mr. Thomas; and (2) Mr. Sauer's impact on Ann's parenting ability and whether or not that affects her ability to have custody. (Trial Transcript, Volume I, page 94, lines 4 - 11.)

29. Dr. Stewart concluded that the Thomas marriage was in trouble for some time before Ann Thomas met Pedro Sauer and did not believe that Mr. Sauer was responsible for the divorce. (Trial Transcript, Volume I, page 95, lines 20 - 25; page 96, lines 1 - 25; and page 97, lines 1 - 20.)

30. Based upon Dr. Stewart's evaluation of Mr. Sauer, Dr. Stewart concluded that Mr. Sauer was aware of Mr. Thomas' position, was sympathetic to that position and was not aggravating the relationship between Mr. and Mrs. Thomas and was sensitive to the children's individual differences and how they related to their father, as well as being generally supportive of Mrs. Thomas. (Trial Transcript, Volume I, page 100, lines 11 - 25, and page 101, lines 1 - 12.)

31. Dr. Stewart did not observe any negative impact on the children by virtue of the relationship between Ann Thomas and Pedro Sauer. (Trial Transcript, page 101, lines 13-17.)

32. Dr. Stewart found agreement with Dr. Jensen's report as to Mrs. Thomas being an exceptional caretaker and that Mrs. Thomas was a very good father. (Trial Transcript, Volume I, page 104, lines 1 - 9.)

33. Dr. Stewart concluded that she saw no evidence that the relationship between Mrs. Thomas and Pedro Sauer had a negative impact on her parenting skills. (Trial Transcript, Volume I, page 105, lines 8 - 25.)
105, lines 8 - 25.)

34. Dr. Stewart did not recommend joint legal or physical custody because the parties were unable to cooperatively work with one another. Joint physical custody would be too stressful on the children, and the children regarded their mother's residence as "home". (Trial Transcript, Volume I, page 106, lines 14 - 25; page 107, lines 1 - 5, page 108, lines 1 - 23.)

35. Dr. Stewart did not find that the children were aware of any confrontation between Pedro Sauer and Mrs. Sauer at Ann Thomas' home. (Trial Transcript, Volume II, page 17, lines 5 - 25, and page 18, lines 1 - 3.)

36. Dr. Stewart agreed with Dr. Jensen's finding that Mr. Thomas was susceptible to "emotional overspill" because of his feelings about the relationship between Mrs. Thomas and Mr. Sauer. (Trial Transcript, Volume II, page 20, lines 1 - 9.)

37. Dr. Stewart could find no objective evidence that the Ann Thomas / Pedro Sauer relationship negatively impacted the

children. On the contrary Dr. Stewart found that Mr. Sauer's presence had a soothing effect and the children expressed a good relationship with Mr. Sauer. (Trial Transcript, Volume II, page 24, lines 13 - 25; page 25, lines 1 - 25, page 26, lines 1 - 17.)

38. The court conducted its own examination of Dr. Stewart and inquired, specifically, about "Brazilian culture", "machismo", and "how an individual with a Brazilian culture might approach a relationship such as this, at least at the initial stages." (Trial Transcript, Volume II, page 43, lines 10 - 14.)

38. The Court concluded that Mr. Sauer was, at the time of trial: (1) a married man; (2) not a citizen of the United States; (3) Brazilian in the United States on a work permit; (4) a martial arts instructor; (5) fathered a child with his wife while attempting to reconcile with her; (6) had been charged with domestic violence; (7) was charged with a possession of a firearm while at Lake Powell and "may have also violated his work permit status in the United States;" (8) participated in other adulterous affairs; (9) was presently going through his own divorce; (10) made Mrs. Sauer's United States residency status unknown; (11) had a dramatic affect on the breakup of the Thomas family; and (12) Mrs. Thomas viewed him as a very positive male role model. (Findings of Fact, ¶72 and 73.)

39. Pedro Sauer owns and operates his own martial arts studio teaching Brazilian Jiu Jitsu and is an instructor for the United States Navy SEAL Team. (Trial Transcript, Volume IV, page

8, lines 10 — 25; page 9, lines 1 - 6.)

40. Mr. Sauer entered a "plea in abeyance" as to a charge of possessing an unregistered gun or some similar charge. There was no conviction. (Trial Transcript, Volume IV, page 16, lines 9 — 25; page 17, lines 1 — 25; page 18, lines 1 - 25; page 19, lines 1 - 25; and, page 20, lines 1 - 5.)

41. Mr. Thomas called Martina Sauer as a witness who stated emphatically that Mr. Sauer has not been violent with her. (Trial Transcript, Volume IV, page 129, lines 2 -10.)

42. The court found that Mr. Sauer was irresponsible, had impacted the Thomas family because he did not contribute financially to it and had a confrontation between himself and his spouse at the Thomas home. (Findings of Fact, ¶78.)

43. Nevertheless, the court concluded, significantly:

"Absent his [Pedro Sauer's] entry and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas. With Pedro in the picture, which he is and intends to be, it is not in the best interests of the children to be in the home and subjected to the negative influence and example of Pedro."
(Emphasis added) Findings of Fact, ¶79.

44. The court found that Mr. Thomas' income was \$69,567 per year which was the average income from 1988 to 1992, prior to separation. (Finding of Fact, ¶106.)

45. Mr. Thomas' income inexplicably, according to his own testimony, declined sharply since separation. (Finding of Fact, ¶104.)

46. Mrs. Thomas earned \$25,824 per month as a school teacher and she was ordered to pay \$334.61 per month based upon a sole custody worksheet (in spite of the fact that the ultimate custody/visitation award constitutes a joint physical custody relationship). (Finding of Fact, ¶113.)

47. The court found that Ann Thomas should be awarded \$700.00 per month as alimony and properly considered all of the elements to arrive at that amount. (Finding of Fact, ¶124 — 127.)

48. However, the court limited the alimony award to thirty-six (36) months and provided for a credit for the amounts paid pursuant to the temporary order. (Finding of Fact, ¶127.) No findings were made which would indicate the basis for the thirty six (36) month limitation on alimony.

49. At the time of the divorce, the parties' family home was worth \$355,000.00. (Finding of Fact, ¶44.)

50. At the time of the parties' marriage, Mr. Thomas had owned the building lot and had begun construction on the family home and it was 35% completed. (Trial Transcript, Volume III, page 44, lines 25; page 45, lines 1 — 25.)

51. Mr. Harwood testified that the value of the home at the time of the marriage was \$150,000.00. (Trial Transcript, Volume III, page 20, lines 22.)

52. However, Mr. Harwood relied upon a "data bank" and comparable sales, or a "market approach" that were not reflected in his report and not available at the time of trial on cross

examination. (Trial Transcript, Volume III, page 44, lines 1 - 24; page 47, lines 4 - 7; and page 49, lines 11 - 14; page 51, lines 3 - 4, and Exhibit 31.)

53. The parties cohabited prior to their marriage and from the period of cohabitation forward Mrs. Thomas contributed to the construction of the home through her own manual labor, the acquisition of building materials, and building of retaining walls and generally assisting the Defendant who acted as the general contractor for the building of the home. The court characterized these efforts as "modest" on the part of Mrs. Thomas. (Finding of Fact, ¶36.)

54. The Respondent acknowledges that Mrs. Thomas assisted in building the retaining walls, getting the materials for the home, and with the interior decoration of the home. (Trial Transcript, dated February 26, 1996, page 127, lines 8 - 23.)

55. The court values Mr. Thomas' "pre-marital" interest in the home at \$150,000.00, apparently adopting Mr. Harwood's opinion based upon the data base which was not available at trial. (Finding of Fact, ¶40 and 50.)

56. Shortly after the marriage of the parties they borrowed \$27,000.00 which has been paid during the marriage and had a principal balance of \$17,500.00. (Trial Transcript, Volume IV, page 83, lines 24 - 25; page 84, lines 1 - 3.) The loan was from Mrs. Thomas' father.

57. The title to the home was conveyed to the parties as joint tenants. (Finding of Fact, ¶34.)

58. Mr. Thomas owns Bert Thomas Construction, Inc.

59. Mr. Thomas maintained a savings account in Bert Thomas Construction as well as an operating checking account. His money was required to pay company expenses or provide income for Mr. Thomas. Funds were transferred from the savings account to the checking account. (Trial Transcript, Volume II, pages 97 - 102)

60. The average account balance for the combined savings and checking account prior to separation was \$39,000.00. The average balance in the account after separation was reduced to \$6,327.62. (See Plaintiff's Exhibits 7, 8, 9, 10 and 11, and Trial Transcript, Volume II, pages 99 - 104).

61. Mr. Thomas has acknowledged utilizing the Bert Thomas Construction Company funds in order to pay his court ordered support obligation under the temporary order. (Trial Transcript, dated February 26, 1996, page 122, lines 8 - 19.)

62. Mr. Thomas testified as to the value of the assets of Bert Thomas Construction Company. The court concluded that there was insufficient evidence to sustain a finding as to the value of the construction company.

63. In addition to the testimony of Derk Rasmussen, CPA, regarding the historical cash assets of the Construction Company, Mr. Thomas testified by way of his Exhibit 63 that the value of the company's "tools" amounted to \$7,634.00. (Exhibit 63, amended by the Respondent at trial to include Items 113 and 114).

SUMMARY OF ARGUMENT

- I. WHERE THE COURT RULED THAT "IT IS CLEARLY IN THE BEST INTEREST OF THE CHILDREN TO BE AWARDED TO ANN THOMAS" IT IS CLEARLY ERRONEOUS TO IGNORE THAT FINDING AND AWARD THE CHILDREN TO THE RESPONDENT BASED SOLELY ON FINDINGS OR MORAL FITNESS AND THE CHARACTER OF A NON-COHABITING THIRD PARTY.

The court correctly concluded that the children's best interests would be served by an award of custody to Mrs. Thomas. However, the court ignored that finding and awarded Mr. Thomas custody. The sole or controlling reasons for the award of custody to Mr. Thomas were: (1) Mrs. Thomas' past moral conduct; and (2) the character of Pedro Sauer, a romantic acquaintance of the Petitioner. In so doing the court placed too much weight upon those factors. This is not a "close call" case. Rather, it is a case where the best interests of the children were otherwise "clear".

The court's conclusions regarding Pedro Sauer appear to be based upon some other experience with Brazilian men and Brazilian culture. The court did not make any connection between Mrs. Thomas' moral conduct or Mr. Sauer's character and the Petitioner's parenting ability or the best interests of the children. In its attempt to make that connection, the court has simply created a transparent rationale for punishing past moral transgressions.

- II. ALIMONY SHOULD CONTINUE FOR A PERIOD NOT TO EXCEED THE DURATION OF THE MARRIAGE WHERE NO FACTS APPEAR WHICH WOULD JUSTIFY TERMINATION AFTER THREE YEARS, INCLUDING PAYMENTS UNDER THE TEMPORARY ORDER.

The Petitioner does not object to the amount of alimony only its duration. The court limited alimony to thirty-six (36) months and provided the Respondent credit for payments made during the pendency of the case. However, there are no findings to indicate that circumstances will change at the end of thirty-six months. In fact, alimony terminated prior to the entry of the decree. The court should extend alimony for a period of time not to exceed the length of the marriage.

III. THE MARITAL HOME IS A COMMINGLED ASSET AND SHOULD HAVE BEEN EQUITABLY DISTRIBUTED TO THE PARTIES. FURTHERMORE, THERE IS NOT RELIABLE FACTUAL BASIS FOR THE COURT'S FINDING OF A PREMARITAL FAIR MARKET VALUE.

The marital home was substantially constructed during the marriage. The lot was owned by the Respondent prior to the marriage and the home construction begun prior to that time. However, Mrs. Thomas has enhanced, maintained and protected the home. The marital home is a peculiar asset when compared with other, traditionally "separate" assets. It is particularly susceptible to "commingling" and was commingled in this case. This court may clarify previous decisions which may be contradictory or confusing regarding the commingling of premarital property.

IV. THE COURT SHOULD HAVE VALUED AND DISTRIBUTED BERT THOMAS CONSTRUCTION COMPANY INCLUDING THE HISTORICAL BALANCE IN THE LIQUID ACCOUNTS WHICH WERE DISSIPATED BY THE RESPONDENT.

The court failed to make findings or to equitably distribute the value of Bert Thomas Construction Company. Not only is the company possessed of "hard" assets including

equipment and cash, the cash on hand was dissipated during the pendency of the divorce during an "inexplicable" reduction in Mr. Thomas' income. The company was susceptible to valuation and is marital property. The use of the liquid assets by Mr. Thomas constitutes dissipation.

DETAIL OF ARGUMENT

POINT I.

WHERE THE COURT RULED THAT "IT IS CLEARLY IN THE BEST INTEREST OF THE CHILDREN TO BE AWARDED TO ANN THOMAS" IT IS CLEARLY ERRONEOUS TO IGNORE THAT FINDING AND AWARD THE CHILDREN TO THE RESPONDENT BASED SOLELY ON FINDINGS OR MORAL FITNESS AND THE CHARACTER OF A NON-COHABITANT THIRD PARTY.

The Appellant challenges the custody ruling of the trial court for the following reasons:

1. The court applied an incorrect legal standard for the determination of custody. The best interests of the children should have been given paramount and controlling consideration. Instead the court placed too much weight upon "past conduct and moral standards of the parties".

2. The court failed to adequately articulate how Pedro Sauer's character deficiencies negatively affected the best interests of the children. The court does not attempt to show that Mrs. Thomas' parenting ability is diminished because of the relationship with Mr. Sauer.

3. Key factual findings regarding Mr. Sauer's past behavior are not supported by the evidence.

Trial courts have broad discretion in custody matters:
"However, while the trial court has broad discretion, it must be guided at all times by the best interests of the child." Tucker v. Tucker, II. 910 P.2d 1209 (Utah 1996) referring to Utah Code Ann. §30-3-10(1).

One of the factors to be considered is the moral conduct of the parties. However,

"Utah courts have previously noted that a custodial parent's censurable extra-marital sexual activities do not in and of themselves make him or her an unfit and improper person to have custody. Tucker v. Tucker I, 881 P.2d 948 (Utah Ct. App. 1994). See Fontenot v. Fontenot, 714 Pl.2d 1131, 1132-33 (Utah 1986); Shioji v. Shioji, 671 P.d 135, 138 (Utah 1983); (Durham, J., concurring and dissenting); Nielsen v. Nielsen, 620 P.2d 511, 514 (Utah 1980) (Hall, C.J., dissenting); Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980); Stuber v. Stuber, 121 Utah 632, 637, 244, P.2d 650, 652 (1952).

In order to avoid the tendency to deny custody to an unfaithful spouse/parent as a punitive matter, Utah courts have required trial judges to show: (1) that the parent's activities run contrary to the child's best interests; and (2) that the inappropriate moral conduct results in an inability to function adequately as the custodial parent and meet the child's needs. Tucker v. Tucker I, Supra, and Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989).

It is inappropriate for the trial court to base its decision solely upon a party's sexual conduct. Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990). In that case, the

matter was not reversed because the court had considered other factors relevant to the child's best interest. In this case the court has considered other, relevant factors. However, in this case, the court determined that based upon the other factors, it would clearly be in the best interests of the children for Mrs. Thomas to be awarded their custody. The decision not to do so is based entirely upon either Mrs. Thomas' past moral conduct or Mr. Sauer's character. If the decision was based upon Mrs. Thomas' moral conduct, absent some connection to her parenting ability, the award is an abuse of discretion. Roberts v. Roberts, 835 P.2d 193 (Cal. 1992), the concept of fault [punishment] is unrelated to best interests; Sanderson v. Tryon, 739 P.2d 623 (Utah 1987). The court should demonstrate how the past moral conduct bears upon the parties' parenting abilities or affects the children's best interests.

The case before the court now is distinguishable from the case of Tucker v. Tucker, supra. In that case the Supreme Court found that it was not a case of parental fitness. Rather, it was a case of basically equal parenting ability between the parents where the scales were tipped slightly based upon one parent's moral fitness.

In this case, the court has determined that the best interests of the children would "clearly" be served if Ann Thomas were awarded custody, but for the influence of Pedro Sauer. The court found Pedro Sauer's influence to be "troubling" for three reasons: (1) because the affair broke up the Thomas family; (2) because Ann Thomas considered Pedro Sauer to be a positive role

model but was in fact "duped by his suave, debonair and romantic influences;" (3) that it was not in the best interests of the children to be in the home and subjected to his negative influence and example.

In so doing, the court expressly and candidly stated that it would ". . . consider the best interests of the child as an important factor, but would also consider the past conduct and moral standards of the parties. . ." (Finding of Fact, ¶57.)

It is apparently from the court's detailed Findings that this was not a "close call" case except for the question of infidelity and the "entry" of Pedro in the Thomas family.

In spite of the fact that Dr. Stewart failed to detect any negative impact of Mr. Sauer on Mrs. Thomas' parenting ability for the best interests of the children, the court has based its custody decision on such a finding. It should be remembered that Dr. Jensen did not interview Pedro Sauer and could not make any findings about his character and affirmatively stated that Mr. Sauer's involvement did not play a central role in determining the children's best interest.

The court, nevertheless, essentially concluded as follows: (1) Pedro Sauer is an unsavory character; (2) the court was "profoundly concerned" over Mrs. Thomas' favorable impression of Mr. Sauer; and (3) the relationship between Mrs. Thomas and Pedro Sauer had a dramatic affect on the breakup of the Thomas family. As a result, custody should be awarded to Mr. Thomas. As a result the court concluded that Mr. Thomas should be awarded custody in spite of the fact that the other custody factors

clearly indicated that the children's best interests would be served if Mrs. Thomas was awarded custody.

This rationale is flawed and an abuse of discretion because: (1) Mr. Sauer's character has not been shown to be relevant to the children's best interests or Mrs. Thomas' parenting ability; (2) some of the findings are not supported by the fact (those that related to domestic violence and being a convicted criminal); and, (3) the discussion regarding the break up of the Thomas family is a roundabout way of punishing Mrs. Thomas for marital infidelity.

Aside from the hearsay evidence of Mr. Thomas, upon which Dr. Jensen relied, the only evidence regarding Pedro Sauer's criminal behavior is his own testimony where he testified that he entered a "plea in abeyance" in regards to the gun charge.

Pedro Sauer's wife was called to testify by Mr. Thomas. Her testimony was that there has been no domestic violence in the Sauer marriage. The only other evidence to support a finding of "domestic violence" would be the charge of Mrs. Sauer, previous, that such violence had occurred. The charge was never proven, no ruling was ever made upon any criminal or civil case of domestic or cohabitant abuse regarding Mr. Sauer.

Beyond those findings, the trial court referred to factors regarding Mr. Sauer's citizenship, his own pending divorce and the fact that he had fathered a child with his wife while separated from her as a basis for denying Ann Thomas custody of her children (and disrupting the status quo custody order). The

court also found that Mr. Sauer was "suave", "debonair", and had "duped" Mrs. Thomas with his "romantic influence".¹

All in all the court concluded that it could not conceive how Pedro would be a positive role model for "little Joseph". Such findings about Mr. Sauer's personality are difficult to quantify or define. More important, however, is the difficulty in relating those findings to Ann Thomas' parenting ability or the best interests of the children. If this standard were applied to other cases, then it would be difficult for any parent to be awarded custody where it was shown that they were involved in a romantic relationship at the time of the breakdown of their marriage. There is no evidence whatsoever that Mr. Sauer was anything worse than a poor "role model". In fact, as the court found:

"The evaluators can make no objective link between the 'affair' and its impact on the children. The fact of the matter is that they are young and may not appreciate the consequences of a fairly discreet sexual affair. . ." (Findings of Fact, ¶78)

Only when extraordinary circumstances exist should the court consider the impact of third parties such as step parents. Rule 4-903 of the Code of Judicial Administration, the Uniform Custody Evaluations, sets forth the criteria that evaluators must consider and respond to each of the factors set forth therein.

¹ The court demonstrated it's own personal concern regarding "Brazilian culture" and "machismo" in its own examination of Dr. Stewart. Those issues had not been raised anywhere else in the proceedings or at trial. (Trial Transcript, Volume II, page 43; lines 10 - 14.)

Section (3)(E)(vii) provides: "The evaluators must consider and respond to 'kinship', including, in extraordinary circumstances, step-parent status." There is nothing in this case to suggest that extraordinary circumstances exist in regards to the relationship between Mr. Sauer and the Thomas children or Ann Thomas for that matter. It is submitted that such extraordinary circumstances would include, obviously, any form of abuse between the third party and the subject children, or behavior that results in some measurable and negative way on the best interests of the children. The court has acknowledged in paragraph 78 of its Findings that no such circumstances exist.

Dr. Stewart specifically found that there was an absence of any negative impact on the Thomas children by virtue of the relationship between Mrs. Thomas and Mr. Sauer. In fact, Mr. Sauer's presence was "soothing" for the Thomas children.

The initial inquiry should be as to the relevance of the findings regarding Mr. Sauer's citizenship, occupation, criminal record (if one exists) or other character attributes. Mr. Sauer is not even a cohabitant in this controversy. Nobody who interviewed the children, including the Judge, was able to identify any negative impact of Mr. Sauer on the children.

The court has attempted to justify the custody award by finding that Mr. Sauer has not contributed financially to the Thomas family, that there was a confrontation at the Thomas house (albeit brief), which was "not positive for the children", that Mr. Sauer is a convicted criminal and there has been a spouse

abuse charge, and that Mr. Sauer had a dramatic affect on the breakup of the Thomas family. None of these findings has anything to do, except in the most collateral and vague sense, with the best interests of the children or Mrs. Thomas' parenting ability. Taken together they do not form the basis of overcoming what the court also found to be "clearly in the best interests of the children" which would be an award of custody to Ann Thomas.

Whether Pedro Sauer is a "suave, debonair", convicted criminal and spouse abuser, and whether Mrs. Thomas does not believe any of that, does not form a sufficient factual basis for the court's custody award. Those allegations, even if taken at face value, do not overcome the court's ultimate conclusion that Mrs. Thomas should be awarded custody but for Mr. Sauer's entry and influence in the equation.

POINT II.

ALIMONY SHOULD CONTINUE FOR A PERIOD NOT TO EXCEED THE DURATION OF THE MARRIAGE WHERE NO FACTS APPEAR WHICH WOULD JUSTIFY TERMINATION AFTER THREE YEARS, INCLUDING PAYMENTS UNDER THE TEMPORARY ORDER.

The court addressed the issue of alimony in its findings no. 115 through 127. In so doing the court properly considered the needs of Mrs. Thomas, her ability to meet her own needs and the ability of Mr. Thomas to assist her. However, the court inexplicably limited the duration of alimony to three years. Moreover, the court awarded the Defendant "credit" for amounts paid pursuant to the temporary order of the court. (Finding of Fact ¶127.) The temporary order of the court was entered on the

11 day of January, 1992. Therefore, alimony terminated before the Decree was even entered.

Utah courts have found that in the absence of articulated findings showing some anticipated change in circumstances, or grounds for "rehabilitative" alimony, the limitation of alimony to an arbitrary period of time is an abuse of discretion. Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991) (an otherwise appropriate award of \$800.00 per month alimony, but limited to one year was made permanent where there were no supporting findings or rationale for the limitation on duration.) In this case there is nothing to suggest that circumstances will change in any financial sense. There were certainly no findings to explain why the court limited alimony to three years or why the court granted "credit" for the alimony paid during the pendency of the case. Normally, decisions regarding the divorce are made at the time of the decree or trial. The exception to that general rule should be based upon clearly stated grounds such as the obstructive activity of a party, the hiding of assets, or the dissipation of assets. Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987); Berger v. Berger, 713 P.2d 695, 697 (Utah 1985); and Fletcher v. Fletcher, 615 P.2d 1218, 1222-1223 (Utah 1980).

POINT III.

THE MARITAL HOME IS A COMMINGLED ASSET AND SHOULD HAVE BEEN EQUITABLY DISTRIBUTED TO THE PARTIES. FURTHERMORE, THERE IS NOT RELIABLE FACTUAL BASIS FOR THE COURT'S FINDING OF A PREMARITAL FAIR MARKET VALUE.

The Appellant does not contest the court's findings regarding the fair market value of the home at the time of the

divorce. Mrs. Thomas' objections are two fold: (1) the failure of the court to consider the home as a marital asset and "commingle" any premarital portion of the Respondent; and (2) the lack of evidence to support the court's finding of a premarital value in the home of \$150,000.00.

Mr. Thomas owned the building lot upon which the family home was constructed for several years prior to the marriage. During this period of time the parties' cohabited. Likewise, the parties worked together on the construction of the home, before and after marriage. At the time of the marriage the home was approximately 35% constructed.

Obviously, 65% of the home was constructed after the marriage. In fact, the testimony of Mr. Thomas was that the home was essentially a work in progress and was still being modified and constructed at the time of the trial.

The home was pledged for a loan which was paid during the marriage and had a balance due at the time of the trial. The home had been transferred from Mr. Thomas' name into the joint names of the parties. Mrs. Thomas had separate assets at the time of the divorce. Her separate assets consisted of stock which had been gifted to her (with similar gifts going to her siblings) of stock from her father and grandfather. These funds had been maintained entirely separately, in Mrs. Thomas' name throughout the marriage.

The rule regarding separate property, and "commingled" property is set forth in Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). The rule is simple: Separate property acquired by a

spouse prior to the marriage, by gift or inheritance during the marriage, should be awarded to that party, unless:

"(1) the other spouse has by his or her effort or expense contributed to the enhancement, maintenance, or protection of that property thereby acquiring any equitably interest in it, or (2) the property has been consumed or its identify lost through the commingling or exchanges or where the acquiring spouse has made a gift of an interest there and to the other spouse. Mortensen, supra, at 306 (citations omitted).

Cases dealing with separate property which follow Mortensen had obscured that rule. See, Utah Bar Journal, Volume XI, No. 3, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce*, April, 1998, pages 16 - 24, David S. Dolowitz, attached as Exhibit G in the Addendum.

Some properties are more likely to be commingled due to "enhancement, maintenance and protection" than others. Other factors would indicate that otherwise separate property has been transformed to marital property such as: the length of time that the property exists during the marriage, the nature of the property, real estate occupied by the parties, separate bank accounts, separate securities, whether the asset requires the ongoing use of marital funds to pay property taxes, mortgage expenses, maintenance, remodeling, repairs or the like:

"The longer gifted, inherited or premarital property is maintained during a marriage the more difficult it is to show it is a separate property. . . As discussed above, the payment of property taxes, refinancing, maintenance, remodeling, repair of a home or a rental property presents the probability of commingling." The Conundrum . . ." Supra, at page 23.

The rationale of the court in awarding Mr. Thomas \$150,000.00 as premarital separate property is as follows: (1) the property was not commingled; and (2) even if it were because it is clear that Mrs. Thomas should get her separate property it is only fair for Mr. Thomas to be awarded his.

If Mortensen v. Mortensen, supra, is to have any meaning, then a case such as this should result in a conclusion that the family home is a marital asset. It was primarily constructed during the marriage. In addition to the payment of a mortgage, taxes, remodeling, repair and maintenance, Mrs. Thomas worked side by side with Mr. Thomas constructing the structure. To compare this asset with Mrs. Thomas' separate assets is a case of "apples and oranges". In addition, the basis upon which the court relied in forming its opinion as to the value of the home at marriage is flawed. The court relied upon the evaluation of Jud Harvard. That appraisal is called a "complete appraisal - restricted appraisal". It purports to state the value of the property in 1982 and at the time of trial. The appraisal as to the 1982 value states that Mr. Harvard relied upon "appraisal files on other properties that I appraised in the early and mid-1980s. . ." And that Mr. Harvard ". . . researched the market and comparable sales that were transacted in the Sundance area during the early and mid-1980s." Exhibit 3, appraisal of Jud Harvard at pages 5 and 6. However, none of the underlying data regarding the 1982 valuation is set forth in the appraisal, nor was the data bank or other information relied upon by Mr. Harvard available at trial.

Rule 705 of the Utah Rules of Evidence require that: "The expert may in any event be required to disclose the underlying facts or data on cross examination." Mr. Harvard was unable to do this. The Petitioner's appraisal did not opine regarding the 1982 value because of the unreliability of any such opinion.

POINT IV.

**THE COURT SHOULD HAVE VALUED AND
DISTRIBUTED BERT THOMAS CONSTRUCTION
COMPANY INCLUDING THE HISTORICAL BALANCE
IN THE LIQUID ACCOUNTS WHICH WERE
DISSIPATED BY THE RESPONDENT.**

The court refused to: (1) place a value on Bert Thomas Construction Company; and (2) find that the use of the savings account during the pendency of the action by Mr. Thomas constituted dissipation. The court did find that the reduction in Mr. Thomas' income was "inexplicable". The court found that Mr. Thomas "has been a reasonably successful contractor earning, typically during the years, just prior to separation, approximately \$70,000.00.) Furthermore,

"Inexplicably and contrary to the Defendant's own testimony, the actual Bert Thomas Construction Company revenue has declined sharply since separation regardless of the trend of residential construction in Utah County and the previous Bert Thomas construction trend." See Exhibit 13 (Findings of Fact, ¶104).

It is undisputed that Mr. Thomas relied upon the cash on hand in Bert Thomas Construction Company accounts (savings and checking) during the pendency of the case. Furthermore, these funds were depleted, substantially, because of the "inexplicable" reduction in Mr. Thomas' income. Derk Rasmussen, CPA, testified

on behalf of the Petition that the Bert Thomas Construction Account balances reduced from a combined average balance of approximately \$37,000.00 for the four years prior to separation, to \$7,470.00 at the time of the trial. (Exhibit 9, 10 and 11.)

Mr. Thomas introduced his own testimony regarding any tools on hand for his construction company with a total combined value at the time of trial of \$7,634.00, see Exhibit 63.

The Petitioner did not seek to attribute any good will to the value of Bert Thomas Construction Company (or the related leasing company). The Petitioner only sought a value for the "hard assets" which would consist of tools, inventory and cash on hand. Evidence was before the court on each of these items. It simply called for adding the amounts together.

The only difficult issue is whether or not Mr. Thomas dissipated this marital asset. In that sense it does not matter whether the parties used Bert Thomas Construction Company money as a de facto family savings account. Even if they did not, it was part of the marital asset.

Utah courts have adopted the doctrine of dissipation of marital assets. Where marital assets are used without the approval or knowledge of the other spouse, in an effort to hide those assets, or in such a manner as to benefit only one party, the court may find the dissipation of assets. Jeffries v. Jeffries, 895 P.2d 835 at 838 (Utah App. 1995). See, also, Shepherd v. Shepherd, 816 P.2d 249 (Utah App. 1994).

Furthermore, other jurisdictions have held that the use of marital assets for payment of temporary support obligations

constitutes dissipation. Lynn v. Lynn, 165 N.J. Super. 328 (N.J. App. Div. 1979), and Weiss v. Weiss, 226 N.J. Super. (N.J. App. Div. 1988).

Mr. Thomas should be required to account for the legitimate and business use of those funds. This is especially so in light of the inexplicable reduction in his income during the pendency of the case. If, as the Petitioner alleges, Mr. Thomas voluntarily reduced his self employment income and relied upon substantial account balances for his support, as well as the payment of temporary support obligations, that behavior should constitute dissipation.

CONCLUSION

The court's custody decision was clearly erroneous where it ignored its own finding regarding the best interests of the children. Similarly, the best interest of the children is a controlling conclusion not an "important" finding. Where the best interest of the children would clearly be served by the Petitioner being awarded custody, it is clearly erroneous for the court to conclude contrary to that where the past moral conduct of the custodial parent does not interfere with her parenting ability or the best interests of the children. Likewise, the character of a non-cohabitant third party was given too much weight by the trial court and does not bear upon Mrs. Thomas' parenting ability or the best interests of the children.

The alimony amount is not contested by the Petitioner. However, the duration of alimony was limited to thirty-six (36) months without any explanation or finding to support that ruling.


By providing the Respondent "credit" for payments under the temporary order, alimony actually terminated before the entry of the decree. This conclusion is not supported by the findings and is clearly erroneous. The court refused to make a finding regarding the value of Bert Thomas Construction Company, a marital asset. Sufficient facts were introduced to do so, including evidence regarding the historical balances in liquid accounts maintained by the company. These accounts were drawn down and dissipated by the Respondent during the pendency of the action. The value of the company, prior to dissipation, should have been equitably divided.

The home of the parties was substantially constructed during the marriage. It was clearly augmented, maintained and protected by Mrs. Thomas and should have been included in its entirety in the marital estate. If not, the court erred in concluding that there was a "premarital" separate portion of the fair market value of \$150,000. This finding is not based upon reliable and credible evidence.

The court's conclusions regarding custody should be reversed and the matter remanded for appropriate findings and decision regarding the Respondent's visitation and parental rights. Additionally, on remand the court should equitably distribute the value of the family home and Bert Thomas Construction Company. Lastly, this court should extend the duration of alimony to a term not to exceed the length of the marriage.

DATED THIS 15 day of July, 1998.

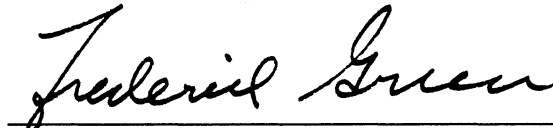
GREEN & BERRY

A handwritten signature in cursive script that reads "Frederick N. Green". The signature is written in dark ink and is positioned above a horizontal line.

FREDERICK N. GREEN
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Frederick N. Green, certify that on the 16 day of July, 1998, I served a copy of the attached Brief of Appellant upon Brent D. Young, Esq. the counsel for Appellee in this matter by mailing a copy by first class mail with sufficient postage prepaid to the following address: 48 North University Avenue, P.O. Box 657, Provo, Utah 84603.

A handwritten signature in cursive script, reading "Frederick N. Green". The signature is written in black ink and is positioned above a horizontal line.

FREDERICK N. GREEN
Attorney for Appellant